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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. McCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioners, a national bank and landlords of national banks, pray that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered May 2, 1950 [R. 331] reversing judgments of the California Superior Court in favor of each of petitioners. Judgments in the trial court had ordered refund of local taxes on "real property" because of "discrimination" in violation of paragraph 3 of 12 U. S. C. 548 (R. S. 5219) and the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States. Petition for rehearing was filed May 17, 1950 [R. 332] and denied June 1, 1950 [R. 439]. Extension of time for filing this petition until October 16, 1950 was granted by this Court [R. 442].

Opinions Below.

The two opinions of the Superior Court [R. 130-137; R. 223-231] are not reported. The opinion of the Supreme Court of the State of California [R. 317-330] is reported in 35 Advance California Reports 332 (217 Pac (2d) 936). The Supreme Court of the State of California rendered no opinion in entering its order denying rehearing [R. 439].

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) and 2101 (c). Drawn into question is construction by the California Supreme Court of rights, privileges, and immunities under:

(a) Paragraph 3 of 12 U. S. C. 548 (R. S. 5219);

(b) The Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States;

(c) The Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

As to (a) and (b), such questions were properly raised by initial pleadings in the trial court [R. 5-7; 36-38; 143-145][1] and were expressly found by it to have been violated in the levy of the taxes on petitioners' "real property" [R. 108-110; 216-217]. But the California Supreme Court in its judgment held such to be *not* vio-

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[1]By stipulation the printed record includes only the complete record in the following cases as typical:

Security-First National Bank v. County of Los Angeles, Superior Court No. 48544, Supreme Ct. No. L. A. 20967 (taxes for 1942) as representative of the five national bank cases [R. 139-231];

W. J. Simms v. County of Los Angeles and *Carrie D. Gribble v. County of Los Angeles,* Superior Ct. Nos. 476894 and 477115, Supreme Ct. Nos. L. A. 20964 and L. A. 20965, tried jointly (taxes for 1941) as representative of the 18 landlord cases [R. 1-138].

Only the Superior Court judgments in the omitted cases have been included in the printed record [R. 232-268].

Where matter is identical, subsequent references are to ***Security-First National Bank v. County of Los Angeles,* No. L. A. 20967.**

lated, except as to certain "special assessment" taxes [R. 322-326; 326]. The last, (c), arose for the first time by reason of the disregard by the court below in its judgment of vested rights of petitioners under the Federal statute and Constitution; it was timely raised on petition for rehearing [R. 347; 388-396].

Constitutional Provisions and Statutes.

Pertinent provisions of the Fourteenth Amendment are contained in Section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of R. S. 5219 involved is paragraph 3 conditionally authorizing State *ad valorem* taxation of "real property" of national banks upon the following terms:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Sections 2, 9, 10, and 16 of Article XIII of the California Constitution are involved herein. California Statutes involved are: (1) Provisions of the California Revenue and Taxation Code relating to the "assessment roll" (Sections 601, 602, and 607); (2) Provisions of said Code relating to "equalization by County Board of Equalization" (Section 1611); (3) Provisions of said Code relating to "payment under protest and suit to recover" (Sections 5136-5143); (4) Provisions of said Code relating to "enforcement of tax after erroneous proceedings" (Sections 4946-4948); and (5) Section 4a of the California Bank and Corporation Franchise Tax Act relating to taxation of national bank income. Pertinent provisions appear in the Appendix.

Questions Presented.

Questions presented by this petition are:

1. Whether local taxation of national bank fixtures as real property is authorized by Paragraph 3 of R. S. 5219 when all other fixtures of the same class are taxed to others, if at all, as personal property?

2. Whether an arbitrary administrative classification, in effecting a tax discrimination between taxpayers of the same class and similarly situated, is a violation of the Equal Protection clause?

3. Whether an arbitrary administrative imposition of taxes on buildings owned by landlords of national banks including discriminatory taxes upon fixtures owned by their tenants is a violation of the Equal Protection clause and R. S. 5219 when buildings owned by all other landlords, as a class, are not taxed for tenant-owned fixtures?

4. Whether it is proper, in determining the extent of local taxes levied on national bank fixtures, arbitrarily classified as real property, to consider the effect of a state tax, imposed solely on national and state banks to compensate for the tax exemption required by paragraph 3, R. S. 5219, when such state tax is computed at a rate dependent upon personal property taxes, paid by non-banking corporations, and such rate was necessarily increased because all fixtures of non-banking corporations were classified as personal property?

5. Whether action by a state court of last resort refusing a taxpayer relief by way of tax recovery judgment granted him by an unassailed and unambiguous State statute, because of a "policy" declared by such state court for the first time in its decision, is a denial of Due Process of Law when, under the facts found, the taxpayer was entitled to recovery of its taxes as invalid under both Paragraph 3 of R. S. 5219 and the Equal Protection clause?

Summary Statement.

Facts: There are no disputed issues of fact. Basic facts were stated by the California Supreme Court in its opinion [R. 317-330] and are set forth below to the extent material:

> "These are appeals from judgments for plaintiffs in twenty-three actions brought to recover taxes paid under protest on certain buildings. In five cases, the building involved was owned and occupied by a national bank which sought recovery for each of the tax years 1942 through 1946. In the remaining cases, the buildings were leased to and occupied by national banks but were owned by different landlords who sued separately for return of sums paid during the period 1941-46, inclusive." [R. 317].
>
> ". . . plaintiffs applied to the county board of equalization for reductions in the assessed valuations of their improvement in amounts equal to the value of bank vault doors and counterlines* installed in their buildings and included in the assessments. The applications were made upon the theory that substantially all property similar to bank vault doors and counterlines had been assessed as personal property, and that the assessment of bank vault doors and counterlines as improvements to realty was therefore discriminatory. The requested relief being denied by the board, plaintiffs paid the taxes under protest and instituted actions for recovery." [R. 317-318].
>
> "For several years prior to 1940 the Los Angeles County Assessor, . . . followed the general practice of classifying bank vault doors and counterlines as personal property. No ad valorem taxes were paid thereon since the personal property of national banks is exempt from local taxation . . . in 1940, however, the assessor reclassified and assessed vault doors and counterlines installed in buildings used for banking purposes as part of the building improve-

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"*The word 'counterlines' is used to denote combinations of counters wickets, grilles, partitions, etc."

ments or real estate . . ." [R. 318; based on findings of trial court, R. 180; 194].

"In each of the tax years involved in the present appeals, bank vault doors and counterlines installed in plaintiffs' buildings were classified as real property and, without being separately valued, were included with the buildings in assessments of improvements. During that period, however, as to property other than that occupied by banks it was the assessor's general practice to classify and assess as *personal* property certain articles, machinery and equipment installed in buildings for purposes of trade, commercial or industrial uses. Typical of this practice was the treatment accorded to more than sixty items of property, including, among others, vault doors and counterlines of jewelers and furriers, refrigerators and counters in public markets, restaurant counters and booths, office partitions, printing presses of metropolitan newspapers, and a variety of heavy industrial machinery such as boilers, ovens and generators." [R. 318-319; based on findings of trial court, R. 180-189.]

"The trial court found and concluded that in classifying and assessing banking fixtures as improvements, the assessor had intentionally, deliberately and without justification deviated from his general practice with regard to the classification and assessment of fixtures, and that such differences in treatment of similar property constituted discrimination against plaintiffs prohibited by various provisions of the federal and state constitutions and by section 5219 of the Revised Statutes of the United States (12 U. S. C. A. §548)." [R. 319; based on findings and conclusions of trial court, R. 199-200; 214.] "It also determined that since bank vault doors and counterlines were included with each building in a single assessment of improvements, the invalid and otherwise valid portions of each assessment were indivisible and consequently all taxes levied thereon were void." [R. 319; based on findings and conclusions of law

of trial court, R. 200-201, 214-217.] "Judgments were accordingly entered for plaintiffs, and these appeals followed." [R. 319; judgments, R. 114-117, 220-222.]

Proceedings Before California Supreme Court: The State Supreme Court adopted all factual findings made by the trial court [R. 318-319]. It held petitioners had complied procedurally with State statute [R. 319-320]. It concluded that national bank fixtures had been correctly classified under State statute as "real property" but all comparable articles (which would not be exempt from taxation if classified as personal property) had been "misclassified" as personal property [R. 320]. Under California law, it held that assessments for tax purposes varying from those made on property of like character would be "invalidated" when, as in this proceeding, the assessor's "deviation" from general practice was "intentional," "deliberate" and not "justified" [R. 321].

In reversing judgments entered in the trial court for petitioners the State Supreme Court approved certain legal conclusions reached by the trial court and disapproved others. It recognized that had bank fixtures received "the same classification accorded fixtures generally, they would have been exempt from taxation" [R. 322]. But relying upon the State tax definition it held that to grant bank fixtures similar "misclassification" would give them "unwarranted exemption" [R. 322]. Contrary to the trial court, the State Supreme Court declared that neither R. S. 5219 [R. 325] nor the Equal Protection clause [R. 324] protected bank fixtures from an "intentional," "deliberate" and "unjustified" tax *classification* different from that accorded other comparable fixtures.

Contrary to the trial court, the State Supreme Court held petitioners' assessments to be "valid" unless a tax "burden" (by reason of resultant taxes) was imposed in

excess of that put on fixtures "misclassified" as personalty [R. 323]. Since fixtures assessed as personal property had been subjected to general city and county taxes at the same rates and in the same proportion of value, it seems to have concluded that petitioners' assessments for general taxes were valid [R. 323-324] but for special assessment taxes (not levied on personal property) were "invalid" [R. 326].

The trial court held that all taxes on petitioners' buildings were "void" [R. 216-217] and entered judgments accordingly [R. 220-222]. As indicated in its opinion [R. 230] respondents would not lose thereby any valid taxes on petitioners' buildings because such buildings were subject to reassessment under State statute [R. & T. C. 4946-4948; App. pp. 5-7] by which back taxes could be collected along with and in addition to current taxes. The State Supreme Court in each of such cases held the special assessment taxes only to be "invalid" [R. 326]. It did not discuss the reassessment statute.

The State Supreme Court rested its judgment almost wholly upon the conclusion that tax "discrimination" prohibited by R. S. 5219 and the Equal Protection clause can be found only in a discriminatory "tax burdens" [R. 324]. In the same decision it found: that Section 4a of the California Bank and Corporation Franchise Tax Act imposed a special and additional "in lieu" tax upon national banks not levied upon non-banking corporations [R. 325-326]; that the rate of this tax was computed by reference to the amount of personal property taxes, including taxes on fixtures assessed as personalty, paid locally by non-banking corporations [R. 326]; but that such tax was levied by and on behalf of the State, not its local entities [R. 326]. It concluded that this State tax should not be considered because "discrimination," it asserted, cannot be shown by "proof of injury resulting from the act of a different and independent taxing agency" [R. 323-324].

The State Supreme Court adopted the trial court's conclusion that the assessments on petitioners' buildings were indivisible and the court had no power to divide them [R. 326-327]. Contrary to the judgments as entered by the trial court which included recovery of all taxes in controversy [R. 130-137; 223-231] subject to right of reassessment [R. 230], the State Supreme Court ordered the trial court to secure from the county board of equalization a determination of the value of the buildings, with bank fixtures excluded, and, based thereon, to enter judgment for petitioners only for special assessment taxes upon the value of the bank fixtures [R. 329-330]. The State Supreme Court ignored requirements of the State tax recovery statute [R. & T. C. 5141; App. p. 5], the limited powers and duties of a county board of equalization [Cal. Const. Art. XIII, Sec. 9, App. p. 2; R. & T. C. 1611, App. p. 3] and the State reassessment statute [R. & T. C. 4946-4948, App. pp. 5-7]. It held it was contrary to "policy" to deprive public bodies of revenue in order to refund taxes void in substantial part and which the court itself could not separate between valid and void parts [R. 327].

The State Supreme Court found that landlords of banks were the *only* landlords taxed for tenants' improvements [R. 324] and thus they had been compelled to pay county and city taxes upon tenants' fixtures, not paid by any other landlords [R. 324]. Contrary to the decision of the trial court,[2] it restricted recovery by petitioner landlords to special assessment taxes upon their tenants' bank fixtures [R. 324].

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[2]The trial court concluded that the taxation to the national bank landlords of tenant-owned bank fixtures was "void" as in violation of the Equal Protection clause [R. 109] and R. S. 5219 [R. 109-110].

The State Supreme Court allowed recovery of the special assessment taxes only because no similar taxes were imposed on personal property and therefore no defense of "equivalency" could be interposed as to the special assessment taxes.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. So Long as a State Generally Classifies and Taxes Fixtures as Personal Property, It Has No Power to Classify and Tax National Bank Fixtures as "Real Property"; Taxes so Levied in Order to Evade Restrictions of R. S. 5219 Constitute "Discrimination."

National banks are agencies of the United States, created under its laws to promote its fiscal policies. They may be taxed by states only in strict conformity with the consent of Congress. *Des Moines National Bank v. Fairweather,* 263 U. S. 103, 106; *First National Bank v. Anderson,* 269 U. S. 341, 347; *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 667-669. As to tangible property, this congressional consent is found only in paragraph 3 of R. S. 5219. No consent is given thereby for states to tax *personal* property. *Owensboro National Bank v. Owensboro, supra; Rosenblatt v. Johnston,* 104 U. S. 462, 463.

Congressional consent, thereunder, to taxation of national bank-owned "real property" is limited to taxes thereon "to the same extent, according to its value, as other real property is taxed." This phase, or slight variant thereof, has been incorporated by Congress in substantially all provisions permitting limited state taxation of property of various federal agencies.[3] Its importance is not restricted to petitioners or to national banks generally.

A state, for tax purposes, may define for itself what constitutes "real property" and such definition will apply

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[3]Reconstruction Finance Corporation, 15 U. S. C. 607 (c. 334, §5, 62 Stat. 265);

Commodity Credit Corporation, 15 U. S. C. 713a—5 (c. 44, §5, 52 Stat. 108);

Federal Credit Union, 12 U. S. 1768 (c. 3, §4, 51 Stat. 4);

Federal Farm Mortgage Corporation 12 U. S. C. 1020-f (c. 33, 48 Stat. 360);

Federal Home Loan Bank, 12 U. S. C. 1433 (c. 150, §8, 49 Stat. 295);

Federal Reserve Bank, 12 U. S. C. 531 (c. 101, §1, 40 Stat. 1314);

to and authorize state taxation under the federal statute as "real property." *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204, 210. Such state definition must, however, "not effect a discrimination against the Government or patently run counter to the terms of the Act." (*Ibid.*)

But "discrimination" may also result from the manner in which a statute is applied. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504. Elimination by *administrative* definition of all other fixtures from the terms of the uniform California statute, with consequent classification and taxation, if at all, as personal property, is as inharmonious with the Congressional consent as would be a statute to the same effect. Compare *Hamilton National Bank v. District of Columbia,* 156 F. (2d) 843, 846. (C. A. D. C.); *Ibid.* (Second Appeal) 176 F. (2d) 624, 630, certiorari denied 338 U. S. 891.

The trial court held that, if national bank fixtures had received the *general* classification, they would have been exempt from taxation under Section 5219 [R. 213]. Factually such was conceded by the State Supreme Court [R. 318]. This finding should have determined the controversy in favor of petitioners. The State Supreme Court, however, held that this would give national bank fixtures an "unwarranted exemption" [R. 322]. But power of Cali-

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Home Owners Loan Corporation, 12 U. S. C. 1463-c (c. 621, 56 Stat. 986);

Federal Deposit Insurance Corporation, 12 U. S. C. 264-p (c. 62, §1, 57 Stat. 65);

Federal Savings and Loan Insurance Corporation, 12 U. S. C. 1725-e (c. 150, §22, 49 Stat. 298);

Production Credit Association, 12 U. S. C. 1138-c (c. 98, §63, 48 Stat. 267).

Additionally by 1947 enactment Congress has employed the phrase "to the same extent" as limiting the authority to levy on governmental transactions many forms of state taxation of an excise character. 4 U. S. C. 104-106.

fornia to tax national bank fixtures does not exist because, under statute law or otherwise, they are "real property." If a State fails to tax land and buildings owned by state-chartered banks, it cannot under R. S. 5219 tax land and buildings of a national bank. *Covington City National Bank v. City of Covington,* 21 Fed. 484, 487. (Cir. Ct. D. Ky.) The power flows only from compliance with conditions expressed in the phrase "to the same extent, according to its value, as other real property is taxed."

These words in tax statutes have long been construed to mean "in the same manner." *People v. Feitner,* 167 N. Y. 1, 8; 60 N. E. 265, 268. On analogous situation the Court of Appeals for the District of Columbia in the second appeal in *Hamilton National Bank v. District of Columbia, supra,* p. 630, said:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in §1703, the national banks in the District which have interest-bearing savings deposits must be classified and taxed in the same manner." (Cert. denied, 338 U. S. 891.)

Likewise on identical facts with this proceeding, was the decision of the Oregon Supreme Court in *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613-616; 130 P. (2d) 9, 16-17. It held taxes levied upon national bank fixtures assessed as real property to be "void" when all similar fixtures had been assessed as personal property.[4]

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[4]The conclusion of the Oregon Court was stated as follows (p. 16):

> "If trade fixtures are classified as personal property for the purpose of taxation, they must be taxed, if at all, as personal property, and not as realty."

Respondents' only power to tax national bank "real property" was thus *on condition* that real property of others be taxed "in the same manner" including classification thereof as real property. Congressional permission to tax the national bank fixtures involved herein was transgressed when the Congressional condition was not fulfilled. The "discrimination" in classification was nonetheless action by the state although the county assessor in failing to give the required "real property" classification to all other fixtures acted contrary to the law of the state. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505. The assessor's failure to comply with the terms of the Congressional consent under R. S. 5219 rendered the national bank fixtures and the buildings, with which they had been indivisibly assessed during the period, "exempt" from state taxation, until by proper reassessment proceedings, uniform in character with assessments made of similar property owned by others, assessments of petitioners' buildings were brought within the terms of the Congressional authority.

2. So Long as a State Classifies and Taxes Fixtures, if at All, as Personal Property, the Equal Protection Clause and R. S. 5219 Require Like Treatment of National Bank Fixtures.

The Equal Protection clause protects the taxpayer from State action which selects him out for discriminatory treatment. It guarantees him "the right to equal treatment." *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 245-246.

The right to equal treatment includes the right to similar "classification." Compare *Hamilton National Bank v. District of Columbia,* 176 F. (2d) 624, 630; *ibid.* (first appeal) 156 F. (2d) 843, 846. Conclusion by the State Supreme Court that had national bank fixtures been given

the same classification applied to other fixtures, they would have been "exempt" [R. 318] required further declaration that petitioners' taxes were prohibited by both the Equal Protection clause and R. S. 5219 and therefore national bank fixtures were "exempt" from local taxation.

In reversing the trial court which so held [R. 213] the California Supreme Court concluded that arbitrary withholding of a benefit granted others (*i. e.,* classification as personal property) is not within the purview of the Equal Protection clause [R. 324]. Decisions of this Court have long held that its prohibition is aimed at "undue favor and individual or class privilege" as well as "oppression." *Truax v. Corrigan,* 257 U. S. 312, 332-333.

While recognizing that equal treatment of national bank fixtures would have required them to be treated as exempt "personal property," the State Supreme Court negatived such result upon the ground that the California statute as construed by it in *Trabue-Pittman Corp. v. County of Los Angeles,* 29 C. (2d) 385, 393; 175 P. (2d) 512, 518, declared them to be "real property" [R. 320]. Under the Equal Protection clause and R. S. 5219 the right to equal treatment is paramount over requirement of statute, even though such results in exemption from state taxation. *Hillsborough Township v. Cromwell, supra; Montana National Bank v. Yellowstone County,* 276 U. S. 499, 503-504.

3. So Long as a State Generally Taxes Buildings Owned by Landlords Without Tenant-Owned Fixtures, the Equal Protection Clause, and R. S. 5219 Require Similar Taxation of Buildings Owned by Landlords of National Banks.

The State Supreme Court acknowledged equal treatment required that buildings owned by national bank landlords should not be taxed for any purpose for their bank tenants' fixtures [R. 324]. Nevertheless, it reversed the tax recovery judgments for petitioner land-

lords, except as to special assessment taxes, upon the ground that each landlord "may" "by contract protect himself against increases in taxes that result from improvements to the building by tenants" [R. 324]. Most landlords of national banks did not protect themselves [R. 83].

On the contrary, decisions of this Court hold that an otherwise invalid tax cannot be justified upon the ultimate resting place of its economic burden nor upon an assumed right of reimbursement by a landlord from his lessee. *United States v. Allegheny County*, 322 U. S. 174, 189. See also: *Builders Club v. United States*, 14 Fed. Supp. 1020, 1022-3 (Ct. Cl.); *Electric Storage Battery Co. v. McCaughn*, 54 F. (2d) 814 (D. C. E. D. Pa.), affirmed 63 F. (2d) 715 (3rd C. C. A.). Particularly is this so if the only party to whom the economic burden could be transferred is itself exempt from payment of such tax when uniformly levied, and its effect is to evade a required exemption. Compare *United States v. Allegheny County, supra*, 188.

4. "Discrimination" in Violation of R. S. 5219 and the Equal Protection Clause Is Not Excused by Levy of Personal Property Taxes on Other Misclassified Fixtures.

This Court has long held in cases involving power of a State to tax property of a federal agency that mere "equivalency" in amount between an unauthorized tax and a valid tax or that the unlawful tax represented no more than "what might have been done," will not bring taxes, in fact levied beyond the bounds of Congressional consent, within the authority of R. S. 5219. *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 683; *First National Bank of Gulfport v. Adams*, 258 U. S. 362,

365. The question is one of power, not of amount. Lack of power cannot be justified by claimed fairness in imposing a similar tax on other property admittedly subject to state taxation. Compare *Freeman v. Hewit,* 329 U. S. 249, 254; *Fairbank v. United States,* 181 U. S. 283, 291.

To the contrary, the State Supreme Court concluded that discriminatory tax classification was not prohibited under R. S. 5219 so far as general county and city taxes were concerned, because "misclassified" fixtures of others were subjected to similar taxes. For such holding it erroneously relied upon decisions of this Court in *Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, and *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373. These decisions were not concerned with power of a State to tax national bank real property nor with the provisions of paragraph 3. They considered state taxes levied on national bank shares and on national bank income authorized, if at all, by paragraph 1(b) or 1(c). Conditions placed upon Congressional consent under these paragraphs are far different from that of paragraph 3, depending not upon similarity of treatment, but upon the "rate" of tax levied on other competing "moneyed capital" or income of non-banking income. In the cited decisions this Court has held that the word "rate" so used refers to *all* taxes levied on competing "moneyed capital" or of other corporations income irrespective of the number of other taxes involved or the manner in which the other taxes were levied. Such construction of a different form of Congressional consent is neither applicable nor persuasive here.

Also "discrimination" prohibited by the Equal Protection clause applies to withholding an "undue favor and individual or class privilege" granted others, as well as to direct unequal "oppression." *Truax v. Corrigan,* 257 U. S. 312, 323-333.

5. Assuming Arguendo Validity of Tax Equivalence Contention, the State Supreme Court Disregarded Decisions of This Court as to What Constitutes Equivalency.

Under Section 4a of the California Bank and Corporation Franchise Tax Act, there is levied by the State for State purposes an additional "in lieu" tax on national bank income not levied on income of non-banking corporations. The State Supreme Court in its decision construed the rate of this tax to be computed "by reference to the amount of local personal property taxes paid by non-banking corporations" [R. 323]. The State tax was designedly imposed to avoid the effect of the local personal property exemption of national bank personal property under R. S. 5219 and the California Constitution [Summary Report, California Tax Bureau, R. 422-430]. It was fixed at the *highest* sum which the State believed it could tax without "discrimination against either banks or corporations" [*ibid.*, R. 424]. Many of the "sixty items of property" found to be "typical" of general "classification" of fixtures as personal property were owned by non-banking corporations.[5] For the California court to consider only taxes *locally* levied on "misclassified" fixtures was to consider but *part* of the taxes imposed under California law by the State and local entities on national banks in relation to their personal property. *Hopkins v. Southern California Telephone Company*, 275 U. S. 393, 403. To impose locally on national bank fixtures both a discriminatory tax based upon their classification as "real property" and at the same time for a State to levy an "in lieu" tax on national bank income based upon the assumption that such articles were exempt

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[5]The index to trial exhibits set forth in "consolidated supplement to Clerk's Transcripts on appeal" discloses such ownership.

from local taxation is akin to double-taxation. Compare *Hopkins v. Southern California Telephone Company, supra,* where on similar record without showing of rates or amounts involved, this court held a local tax so levied to be invalid under the Equal Protection clause.

The State court gave as its reason for refusing to consider the effect of such additional state tax that a claim of "discrimination" could not be supported "by proof of injury resulting from the act of a different and independent taxing authority" [R. 324]. This Court under the Equal Protection clause has held that taxes imposed by all agencies, state and local, are to be regarded as having been levied by "one tribunal" and assessments made under both as "one judgment." *Greene v. Louisville & Interrurban R. R. Co.,* 244 U. S. 499, 518. For purpose of determining whether the Congressional consent under R. S. 5219 has been complied with, or limitations of the Equal Protection clause met, acts of all state and local officials involved must be "treated as if merged in a single officer." *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-245. In the later of the two cases relied upon by the State Supreme Court (*Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, 567-568) this Court held that, when it was required to determine the extent of state taxes on income of non-banking corporations, it was necessary to make "an examination of the whole tax structure of the state."

Even though the equivalency doctrine relied upon by the California Supreme Court were valid, which it is not under prior decisions of this Court (*supra,* pp. 15-16), on the facts of this case it could not support the judgment below. When the State-imposed tax is properly taken into consideration, "discrimination" in taxes on national bank fixtures is apparent on any theory.

6. In Withholding From Petitioners Full Recovery of Their Invalid Taxes Contrary to Decisions of This Court and as Required by Valid State Statute, the Judgment of the California Supreme Court Was a Denial of Due Process of Law.

A declaration by a court of last resort, as in this case, that a taxpayer has been wronged in violation of Federal Statute or Constitution requires more than such admission of wrongdoing. A taxpayer's constitutional right includes the right to judgment by the state court refunding *in full* the invalidly exacted taxes. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247.

By statute, California recognizes this duty [R. & T. C. 5136-5143, App. pp. 3-5]. Thereunder, a wronged taxpayer is entitled to pay a tax, invalid because of "void assessment," under protest and to sue and recover judgment refunding him *all* taxes based on such void assessment. In compliance with this statute the trial court entered judgments refunding petitioners *all* taxes paid on their invalid building assessments [R. 130-137; 223-231] subject to respondents' later right to reassess the buildings constitutionally in accordance with the method applied uniformly to other buildings [R. & T. C. 4946-4948, App. pp. 5-7; for reliance thereon by the trial court see R. 230.]

The California Supreme Court, in reversing the trial court and refunding to petitioners only special assessment taxes, intentionally and deliberately denied to them the relief expressly provided by state statute in such cases and thereby left in the public treasury the major portion of the invalid taxes previously exacted. Moreover, it never questioned the validity of the state statute it ignored nor its clear and unambiguous meaning.

These suits were conducted pursuant to specific statutory procedure [R. & T. C. 5136-5143, App. pp. 3-5]. For a taxpayer to prevail thereunder the trial court *must*

find "that the *assessment* complained of is *void* in whole or in part" [R. & T. C. 5141, App. p. 5]. The statute prescribes that the resulting judgment shall be for "the amount of taxes paid on *so much* of the *assessment* as is found to be *void*" [R. & T. C. 5141, App. p. 5].

The trial court found that, under the circumstances of this case, assessment of national bank fixtures as "real property" was prohibited by both R. S. 5219 [R. 215] and the Equal Protection clause [R. 215]. Because the fixture portions of the assessments were judicially indivisible from assessments on the remainder of petitioners' buildings, it held them *entirely* "void" [R. 214-215]. Such latter determination, upon the facts of this proceeding, was required by decisions of this Court. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 416; *California v. Central R. R. Co.*, 127 U. S. 1, 45. The judgment of the trial court [R. 220-222] for recovery of all taxes "paid" on their building assessments was the *only* judgment authorized [R. & T. C. 5141, App. p. 5].

The State Supreme Court approved all factual findings made by the trial court [R. 318-319]; it recognized that equal treatment required classification of bank fixtures as personal property with consequent exemption from local taxation [R. 319]; and it found under California law that "if the taxing authorities 'resort to arbitrary methods varying from those employed in assessing other property of like character and situation, and resulting in the imposition designedly of an illegal burden on the part of the complainant' " the resulting assessments would be "invalidated by the courts" [R. 321].

Without consideration of facts so found or its own declaration as to applicable law, the State Supreme Court ignored the invalidity of the *assessments* and regarded the case as one involving only invalidity of subsequently imposed *taxes*. It referred to taxes on each building as being in part "valid" and in part "invalid" [R. 326]. But there was only *one* assessment each of petitioners' building, regardless of the number or kinds of taxes extended

against it [R. 169]. In California there cannot be a valid tax for any purpose levied on a *void* assessment. Cal. Const. Art. XIII, Sec. 10 (App. p. 1); *People v. Hastings*, 29 Cal. 449, 451; *Universal Consolidated Oil Co. v. Byram*, 25 Cal. 2d 353, 361. In ordering the trial court to refund only special assessment taxes the State Supreme Court ordered a judgment in defiance of statute.

The statute places the duty upon the court to determine the extent of the "void" assessment [R. & T. C. 5141, App. p. 5]. The trial court held it could not divide building assessments between fixtures and the remainder of the buildings [R. 200-201; 214-215; 228-230]. The California Supreme Court approved this conclusion [R. 326-327]. Accordingly, in each case, the trial court held the assessment to be wholly void [R. 214-215]. But, nevertheless, the State Supreme Court ordered the trial court, in disregard of statute, to refer such assesments for division to the county board of equalization, a body entirely unauthorized by state statute or Constitution to make such separation. Cal. Const. Art. XIII, Sec. 9 (App. p. 2); R. & T. C. 1611 (App. p. 3).

The State Supreme Court excused this disregard of the statute-required judgment and the consequent denial to petitioners of their vested rights thereto upon the ground, for the first time so declared, of a *court* "policy" that to "require defendants to refund the valid portion of the special district taxes attributable to the value of plaintiff's buildings and to pay interest thereon" "would be contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions" [R. 327]. The California Supreme Court thus deliberately arrogated to itself, in violation of petitioners' vested Federal rights thereunder, authority to override a valid statute, an act which this Court has uniformly held not to be within the permissible limits of the judicial function. *Osborn v. Ozlin*, 310 U. S. 53, 66.

This Court, by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-680, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Petitioners specifically raised their additional injury under the Due Process clause on petition for rehearing [R. 347, 388-396]. The California Supreme Court denied such petition [R. 439] without opinion or modification of its former judgment. Petitioners' additional Federal question was timely since raised at their first opportunity. *Missouri ex rel. Missouri Co. v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.

CONCLUSION.

Wherefore, it is submitted that the Writ of Certiorari prayed for in the petition herein should be granted, and the judgment and order of the California Supreme Court should be reversed.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX.

1. Pertinent Provisions of the California Constitution and Statutes Relating to the Assessment of Local Ad Valorem Taxes.

ARTICLE XIII, SECTION 2, CALIFORNIA CONSTITUTION.

2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.

ARTICLE XIII, SECTION 10, CALIFORNIA CONSTITUTION.

10. All property, except as otherwise in this Constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law.

DIV. 1, PART 2, CHAP. 3, ART. 6 OF THE CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ASSESSMENT ROLL."

Section 601. The assessor shall prepare an assessment roll, as directed by the board, in which shall be listed all property within the county which it is the assessor's duty to assess.

Section 602. This local roll shall show:

(a) The name and address, if known, of the assessee.

(b) Land by legal description.

(c) A description of possessory interests sufficient to identify them.

(d) Personal property. A failure to enumerate personal property in detail does not invalidate the assessment.

(e) The cash value of real estate, except improvements.

(f) The cash value of improvements on the real estate.

(g) The cash value of improvements assessed to any person other than the owner of the land.

(h) The cash value of possessory interests.

(i) The cash value of personal property, other than intangibles.

(j) The revenue district in which each piece of property assessed is situated.

(k) The total taxable value of all property assessed, exclusive of intangibles.

(l) The actual value of solvent credits, after legal deductions for debts.

(m) Any other things required by the board.

Section 607. Land and improvements thereon shall be separately assessed.

2. Pertinent Provisions of the California Constitution and Statutes Relating to Powers and Duties of a County Board of Equalization.

ARTICLE XIII, SECTION 9, CALIFORNIA CONSTITUTION.

. . . The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; . . .

DIV. 1, PART 3, CHAP. 1 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "EQUALIZATION BY COUNTY BOARD OF EQUALIZATION."

Section 1611. After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

3. Pertinent Provisions of California Statutes Relating to Payment of Local Taxes Under Protest and Terms of Judgment in Tax Recovery Actions.

DIV. 1, PART 9, CHAP. 5, ART. 2 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "PAYMENT UNDER PROTEST AND SUIT TO RECOVER."

Section 5136. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5137. The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

(b) The grounds on which the claim is founded.

Section 5137.5. The written protest shall be numbered by the tax collector and filed in his office and the fact of

such protest and the number thereof shall be marked on the roll or delinquent roll, opposite the tax to which the payment relates.

Section 5138. Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 5139. The action may be brought only:

(a) As to portion of the assessment claimed to be void.

(b) On the grounds specified in the protest.

(c) By the owner, his guardian, executor, or administrator.

Section 5140. On payment of a judgment against the county in an action under this article, any part of the tax recovered which was paid by the county treasurer to the State Treasurer is an amount due the county from the State and shall be deducted in the next settlement had by the county with the Controller.

Section 5141. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs.

Section 5142. Where the taxes sought to be recovered have been paid after delinquency, the amount of penalties, interest or costs recoverable in actions brought under this article shall be computed only on the taxes recovered.

Section 5143. As used in this article, "tax" or "taxes" includes penalties, interests and costs.

4. Pertinent Provisions of California Statutes Relating to Reassessment Proceedings.

DIV. 1, PART 9, ART. 3 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ENFORCEMENT OF TAXATION AFTER ERRONEOUS PROCEEDINGS."

Section 4946. All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may on satisfactory proof submitted by the tax collector be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney upon a showing that the collection of the delinquent tax cannot be enforced because of any errors in description, assess-

ment, equalization, levy, or any other proceeding. If all or any portion of the property was taxable for the year or years for which the cancellation is made, the clerk shall send a notice to the last assessee of the property respecting the cancellation. A similar notice shall be sent to the last assessee, except that the grounds of cancellation need not be stated, in the event that any tax, penalty or costs, or any portion thereof, is ordered canceled or held void or ordered refunded by a final judgment of a court of competent jurisdiction.

Section 4947. The notice shall state:

(a) The grounds of cancellation;

(b) That collection of the tax for the year for which cancellation was made will be enforced unless cause is shown why such action should not be taken;

(c) That the assessee may demand a hearing by the board of supervisors within ten days after the notice is sent. If demanded, the board of supervisors shall set a time for the hearing and its decision is final as to whether or not collection of the tax should be enforced. If any portion of the property was taxable for the year for which cancellation is made, the board of supervisors shall order collection of the corrected tax for the year for which cancellation was made.

Section 4948. If the board of supervisors orders that collection of the tax should be enforced, the assessor shall assess the property at its value on the lien date of the year for which cancellation was made.

The property shall be entered on the roll prepared or being prepared in the assessment year when the cancellation is made. The entry shall be followed with "Taxes

canceled for year 19.... and collection ordered enforced by Board of Supervisors ..... 19....."

The amount charged against the property on the roll on which it is entered shall be the corrected tax for the year for which the cancellation was made. No penalties or other charges shall be charged on this assessment except those which may attach to other property assessed for the year in which this property is placed on the roll. If the tax rate for the year for which the cancellation is made has not been held invalid by a court, the tax rate to be applied shall be the rate fixed for such year. If the tax rate or any portion of it has been held invalid by a final judgment of the court, the corrected tax shall be determined by the auditor by applying all such judgments in the manner prescribed by the Controller.

Any revenue received on this assessment for the year for which cancellation is made shall be treated like revenue received from delinquent taxes for such year.

The collection of the tax shall be enforced in the same manner as the tax on other property on the roll on which it is entered.

5. Pertinent Provisions of the California Constitution and Statutes Relating to Exemption From Local Taxation of Personal Property of Banks and Taxation of Bank Income at a Higher Rate Because of Such Exemption.

ARTICLE XIII, SECTION 16, CALIFORNIA CONSTITUTION.

1. (a) Banks, including national banking associations, located within the limits of this State, shall annually pay to the State a tax according to or measured by their net income, which shall be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property, at the rate to be provided by law.

(b) The Legislature may provide by law for any other form of taxation now or hereafter permitted by the Congress of the United States respecting national banking associations; provided, that such form of taxation shall apply to all banks located within the limits of this State.

SECTON 4a, CALIFORNIA BANK AND CORPORATION FRANCHISE TAX ACT (California Statutes 1933, page 871, as amended).

Section 4a. Rate of tax on national banking associations and other banks and financial corporations. The rate of tax on National banking associations and other banks and financial corporations mentioned in Sections 1, 2, and 4 of this act, shall be a percentage equal to the percentage of the total amount of net income, allocable to this State, of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilities Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this State as franchise taxes according to or measured by such net income, and required to be paid to this State or its political subdivisions by such corporations as personal property taxes during the preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 8 percentum. The percentage of the net income of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilties as defined in the Public Utilities Act, required to be paid to this State or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 4 percentum thereof, bears to the total amount of net income of such

corporation, allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to California the personal property taxes required to be paid by such corporation to this State or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.

The commissioner, after public hearing and opportunity given to examine the data on which his determination is based, shall determine not later than the thirty-first day of December of each year the average percentage of net income above specified, and, within thirty days after his determination, shall mail notice of his determination and the amount of tax payable on the basis of such determination to all banks and financial corporations affected thereby, which are then classified on his records as banks or financial corporations, but such determination shall not be considered a deficiency assessment within the meaning of Section 25 hereof. The data gathered by the commissioner in determining the rate, referred to herein, shall be made available to the taxpayers affected by such determination at the time and in the manner prescribed by regulations adopted by the commissioner.

If it be judicially determined that the rate of tax on any bank or corporation is higher than is authorized by law such bank or corporation shall be relieved of liability for any tax imposed by this act only to the extent of the excess beyond that legally authorized.

FILED
OCT 14 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner national bank prays that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered May 2, 1950 [R. 141] reversing judgment in its favor by the Superior Court of the State of California in and for the County of Los Angeles. Judgment in the trial court had ordered refund of local taxes on petitioner's "real property" because of "discrimination" in violation of paragraph 3 of 12 U. S. C. 548 (R. S. 5219) and the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

Except for one procedural aspect, the judgment of the State Supreme Court herein is supplemental to and based upon the decision of said court rendered on the same day in *W. J. Simms, et al. v. County of Los Angeles, et al.* [R. 127-141] which is also sought to be reviewed in *certiorari* by this Court in case number 361, October Term, 1950.

Petitions for rehearing herein and in the *Simms Case*

were filed on May 17, 1950 [R. 143; 178], and denied in both on June 1, 1950 [R. 177; 285]. Extension of time for filing this petition until October 16, 1950 was granted by this Court [R. 294].

Opinions Below.

The opinion of the Superior Court [R. 68-75] is not reported. The opinion of the Supreme Court of the State of California [R. 124-126] herein is reported in 35 Advance California Reports 348 (217 P. 2d 946). The opinion of the State Supreme Court in the companion *Simms Case* is reported in 35 Advance California Reports 332 (217 P. 2d 936) and is included in the record herein [R. 127-141]. The State Supreme Court rendered no opinion in entering its order denying rehearing herein [R. 177] and none in the companion *Simms Case* [R. 285].

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 2101(c). Drawn into question is construction by the California Supreme Court of rights, privileges, and immunities under:

(a) Paragraph 3 of 12 U. S. C. 548 (R. S. 5219);

(b) The Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States;

(c) The Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

As to (a) and (b), such questions were properly raised by initial pleadings in the trial court [R. 4-6] and were expressly found by it to have been violated in the levy of the taxes on petitioner's "real property" [R. 58-61]. But the California Supreme Court in its judgment held such to be ***not*** violated, except as to certain "special assessment" taxes [R. 132-133; 134-136; 137]. The last, (c), arose

for the first time by reason of the disregard by the court below in its judgment of vested rights of petitioners under the Federal statute and Constitution; it was timely raised on petition for rehearing filed in the California Supreme Court [R. 150; 160-167].

Constitutional Provisions and Statutes.

Pertinent provisions of the Fourteenth Amendment are contained in section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of R. S. 5219 involved is paragraph 3 conditionally authorizing State *ad valorem* taxation of "real property" of national banks upon the following terms:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any state or any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Sections 2, 9, 10, and 16 of Article XIII of the California Constitution are involved herein. California Statutes involved are: (1) Provisions of the California Revenue and Taxation Code relating to the "assessment roll" (Sections 601, 602, and 607); (2) Provisions of said Code relating to "equalization by County Board of Equalization" (Sections 1601, 1603-1611); (3) Provisions of said Code relating to "payment under protest and suit to recover" (Sections 5136-5143); (4) Provisions of said Code relating to "enforcement of tax after erroneous proceedings" (Sections 4946-4948); and (5) Section 4a of the California Bank and Corporation Franchise Tax Act relating to taxation of income of national banking associations. Pertinent provisions of these sections are set forth in Appendix A (pp. 1-9).

Questions Presented.

Questions presented by this petition are:

1. When a state court of last resort by companion decision entered on the same day finds that earlier application made to a board of equalization by other taxpayers in the same year upon identical grounds had been fruitless, is it not contrary to decisions of this Court for such state court to hold that a taxpayer, whose claim is based upon the discrimination prohibited by R. S. 5219 and the Equal Protection clause, is barred from recovery of a judicially found invalid tax solely because it failed to make a further and futile application to the same board for relief?

2. When administrative relief is no longer available because of passage of time, is not a judgment of a state court of last resort in 1950 a denial of Due Process of Law when it holds for the first time and contrary to its rule of decision since 1911 that a taxpayer otherwise entitled to recovery of taxes, invalid as in violation of R. S. 5219 and the Equal Protection clause, is barred from such recovery for failure to have made initial application for relief to a county board of equalization in 1941?

3. Whether local taxation of national bank fixtures as real property is authorized by paragraph 3 of R. S. 5219 when all other fixtures of the same class are taxed to others, if at all, as personal property?

4. Whether an arbitrary administrative classification, in effecting a tax discrimination between taxpayers of the same class and similarly situated, is a violation of the Equal Protection clause?

5. Whether it is proper in determining the extent of local taxes levied on national bank fixtures, arbitrarily classified as real property, to consider the effect of a state tax, imposed solely on national and state banks to compensate for the tax exemption required by Paragraph 3, R.S. 5219, when such state tax is computed at a rate dependent upon personal property taxes, paid by non-banking

corporations, and such rate was necessarily increased because all fixtures of non-banking corporations were classified as personal property?

6. Whether action by a state court of last resort refusing a taxpayer relief by way of tax recovery judgment granted him by an unassailed and unambiguous State statute, because of a "policy" declared by such state court for the first time in its decision, is a denial of Due Process of Law when, under the facts found, the taxpayer was entitled to recovery of its taxes as invalid under both Paragraph 3 of R.S. 5219 and the Equal Protection clause.

Summary Statement.

Facts: This is an action brought by petitioner national bank to recover 1941 taxes paid under protest which had been levied upon a building owned and occupied by it for banking purposes. Petitioner's ground for recovery was that there had been included in its building assessment, contrary to the practice as to all other buildings, fixtures owned by petitioner which under the assessor's general practice of classifying other fixtures as personal property, if granted similar treatment, were exempt from State *ad valorem* taxation under R. S. 5219, the Equal Protection clause, and provisions of the State Constitution (Cal. Const. Art. XIII, section 16, 1; (a); App. A, p. 7).

Judgment was rendered herein by the trial court for petitioner for recovery in full of its building taxes [R. 64-67] subject to reassessment by respondents as to the building proper in accordance with State statute (R. & T. C. 4946-4948; App. A, pp. 5-7).

Such judgment was rendered concurrently by the trial court with 23 other judgments, based upon substantially identical findings and conclusions on similar facts covering the period 1941-1946, in suits brought by petitioner national bank or landlords of buildings occupied by national banks as tenants.

In its decision in the *Simms Case* [R. 127-141], the California Supreme Court reversed these other judgments by single judgment, review of which is sought from this Court in Case No. 261. A separate decision and judgment was rendered in this case which, however, relied wholly upon the opinion in the *Simms Case* for statement of facts and substantive law involved [R. 124-126].

Basic facts herein, as stated by the State Supreme Court in the companion *Simms Case,* with appropriate reference to the identical findings and conclusions of law entered by the trial court herein, are set forth below to the extent material:

> "For several years prior to 1940 the Los Angeles County Assessor, . . . followed the general practice of classifying bank vault doors and counterlines[1] as personal property. No ad valorem taxes were paid thereon since the personal property of national banks is exempt from local taxation. Following the decision . . . in San Diego Trust & Savings Bank v. County of San Diego, 16 Cal. 2d 142, in 1940, however, the assessor reclassified and assessed vault doors and counterlines installed in buildings used for banking purposes as part of the building improvements or real estate . . ." [R. 128; based on findings of trial court, R. 30-31; 44].
>
> "In each of the tax years involved in the present appeals, bank vault doors and counterlines installed in plaintiffs' buildings were classified as real property and, without being separately valued, were included with the buildings in assessments of improvements. During that period, however, as to property other than that occupied by banks it was the assessor's general practice to classify and assess as *personal* property certain articles, machinery and equipment installed in buildings for purposes of trade, commercial or industrial uses. Typical of this practice was the

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[1]By footnote elsewhere the court indicated that "The word 'counterlines' is used to denote combinations of counters, wickets, grilles, partitions, etc."

treatment accorded to more than sixty items of property, including, among others, vault doors and counterlines of jewelers and furriers, refrigerators and counters in public markets, restaurant counters and booths, office partitions, printing presses of metropolitan newspapers, and a variety of heavy industrial machinery such as boilers, ovens and generators" [R. 129; based on findings of trial court, R. 31-39].

"The trial court found and concluded that in classifying and assessing banking fixtures as improvements, the assessor had intentionally, deliberately and without justification deviated from his general practice with regard to the classification and assessment of fixtures, and that such differences in treatment of similar property constituted discrimination against plaintiffs prohibited by various provisions of the federal and state constitutions and by section 5219 of the Revised Statutes of the United States (12 U. S. C. A. §548). [R. 129-130; based on findings and conclusions of trial court, R. 48, 58-59.] It also determined that since bank vault doors and counterlines were included with each building in a single assessment of improvements, the invalid and otherwise valid portions of each assessment were indivisible and consequently all taxes levied thereon were void. Judgments were accordingly entered for plaintiffs, and these appeals followed" [R. 130; based on findings and conclusions of trial court, R. 48-49, 59-60, 60-61.]

The State Supreme Court said in the present case:

"This case differs from Simms v. County of Los Angeles, ante p. ....., in that in the present case plaintiff did not apply to the board of equalization for correction of the assertedly erroneous assessment. The trial court held that plaintiff was not precluded from maintaining this action for recovery of taxes paid under protest" [R. 124; based on findings and conclusions of trial court, R. 60].

Proceedings Before California Supreme Court: In its two decisions the State Supreme Court adopted factual findings made by the trial court [R. 128-129]. It held petitioners had complied procedurally with the state protest

statute [R. 130]. It concluded that national bank fixtures had been correctly classified under state statute as "real property" but all comparable articles had been "misclassified" by the assessor's general practice as personal property [R. 130]. Under California law, it held that assessments for tax purposes varying from those made on property of like character would be "invalidated" when, as here, the assessor's "deviation" from general practice was "intentional," "deliberate" and "not justified" [R. 130-131].

In reversing judgments entered in the trial court for petitioners in the *Simms Case* the State Supreme Court approved certain legal conclusions reached by the trial court herein and disapproved others. It recognized that had bank fixtures received "the same classification accorded fixtures generally, they would have been exempt from taxation" [R. 132-3]. But relying upon the state definition of fixtures for tax purposes as real property, it held that to grant bank fixtures a similar "misclassification" would accord them an "unwarranted exemption" [R. 133]. Contrary to the trial court herein[2] the State Supreme Court in the *Simms Case* declared that neither R. S. 5219 [R. 136] nor the Equal Protection clause [R. 134-5] protected bank fixtures from "intentional," "deliberate" and "unjustified" tax *classification* different from that accorded other comparable fixtures.

Contrary to the trial court herein[3] the State Supreme Court in the *Simms Case* held petitioners' assessments therein to be "valid" unless a tax "burden" (by reason of

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[2]The trial court concluded that the difference in classification "treatment" given by the assessor constituted "discrimination" prohibited by R. S. 5219 [R. 58-59] and the Equal Protection clause [R. 58-59].

[3]In view of the assessor's general practice, the trial court held that assessments of national bank fixtures as real property were in violation of R. S. 5219 [R. 59-60] and the Equal Protection clause [R. 59-60], and, therefore, "void."

resultant taxes) was imposed in excess of that put on fixtures "misclassified" as personalty [R. 135]. Since fixtures assessed as personal property had been subjected to general city and county taxes at the same rates and in the same proportion of value, it concluded that petitioners' assessments for general taxes were valid [R. 136] but for special assessment taxes (not levied on personal property) were "invalid" [R. 137].

The trial court herein held that all taxes on petitioner's buildings were "void" [R. 61] and entered judgments accordingly [R. 64-67]. Under the judgments of the trial court, the taxing entities would not thereby lose any *valid* taxes on petitioners' buildings because such buildings were subject to reassessment under state statute (R. & T. C. 4946-4948; App. A, pp. 5-7) by which taxes on petitioners' buildings for the period of found invalidity could be collected along with and in addition to current taxes. The State Supreme Court in the *Simms Case* held the special assessment taxes only to be "invalid" [R. 137] and restricted petitioners' judgments therein to such [R. 141]. It ignored the reassessment statute.

The State Supreme Court rested its results in the *Simms Case* to the extent they conflicted with the reasoning of the trial court almost wholly upon its conclusion that tax "discrimination" prohibited by R. S. 5219 and the Equal Protection clause can be found only in discriminatory "tax burdens" [R. 135]. In the same *Simms* decision it found: that Section 4a of the California Bank and Corporation Franchise Tax Act imposed a special and additional "in lieu" tax upon national banks not levied upon non-banking corporations [R. 136]; that the rate of this tax was computed by reference to the amount of personal property taxes, including taxes on fixtures assessed as personalty, paid locally by non-banking corporations [R. 136]; but that such tax was levied by and on behalf of the State,

not its local entities [R. 134]. It concluded that this State tax should not be considered as part of the true tax burden on national bank fixtures because "discrimination," it asserted, cannot be shown by "proof of injury resulting from the act of a different and independent taxing authority" [R. 134].

The State Supreme Court in the *Simms Case* adopted the trial court's conclusion that petitioners' assessments were indivisible and could not be judicially separated between fixtures and buildings [R. 137]. Contrary to the judgments as entered by the trial court which included recovery of all taxes in controversy [R. 68-75], subject to right of reassessment, the State Supreme Court in the *Simms Case* ordered the trial court to secure a determination of the value of the buildings, with bank fixtures excluded, from the county board of equalization and, based thereon, to enter judgment for petitioners only for special assessment taxes upon the value of the bank fixtures [R. 140]. In so doing, the California Supreme Court ignored requirements of the state tax recovery statute [R. & T. C. 5141 (App. A, p. 5)], the limited powers of a county board of equalization [Cal. Const. Art. XIII, sec. 9 (App. A, p. 2); R. & T. C. 1611 (App. A, p. 3)] and the state reassessment statute [R. & T. C. 4946-4948 (App. A, pp, 5-7)]. It simply held it was contrary to "policy" to deprive public bodies of revenue in order to refund taxes void in substantial part and which the court could not separate between valid and void parts [R. 137].

In this case, the State Supreme Court refused even to grant such *limited* relief to petitioner because petitioner had not applied formally to the county board of equalization so that it "could have eliminated the discrimination by directing the assessor to enter the misclassified fixtures owned by others as real property upon the assessment roll" [R. 126]. The Supreme Court thus held that the prelimi-

nary administrative relief for want of which it barred petitioner's recovery herein of a found invalid tax was not action to reduce or correct its own illegal assessment, but failure to take administrative steps which, if complied with, would have *increased* assessments of all other taxpayers similarly situated made contrary to State statute.

The California Supreme Court recognized that there was no obligation upon a taxpayer in any case to appear before a county board of equalization if the property assessed in whole or in part was "tax exempt" or "outside the jurisdiction" of California to tax [R. 124]. As in the *Simms Case,* the State Supreme Court predicated its found want of compliance with administrative relief upon the assumption that national bank fixtures because of definition by state statute as "real property" must be regarded as taxable property procedurally as well as substantively.

The State Supreme Court disregarded its finding in the *Simms Case* that application had been made in the same year and before the same board by landlords of national banks and the board with full knowledge of "the facts" showing "discrimination" against national bank fixtures had refused relief [R. 132]. These applications were for relief under Section 1611 [R. 109]. Although primarily directed at assessments of buildings owned by landlords of national banks, petitioner and other national banks directly participated therein [R. 121].

The trial court herein held that petitioner was not precluded from recovery by failure to appear before the county board of equalization since "the sole question involved in its assessment was legality of the classification and assessment of plaintiff's property" [R. 60]. The trial court relied upon the decision of the California Supreme Court in *Brenner v. City of Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397 (1911). Until the decision in this case the *Brenner Case* had been uniformly followed in California. The contrary holding in 1950 in the judgment below was applied ***retroactively*** to petitioner's case made in 1941 in

reliance upon the *then* unquestioned rule. The State Supreme Court in summarily reversing judgment for petitioner found it, because of passage of time, *now* could not employ the new-found administrative remedy [R. 126].

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner's reasons for issuance of the Writ herein as to questions 3 to 6, inclusive, are identical with those presented to this Court on petition for *certiorari* in the *Simms Case* No. 361. To avoid repetition, such reasons are set forth with appropriate references to this record in Appendix B (pp. 10-21) to this petition. They will not be referred to below except as necessary to discuss questions 1 and 2.

1. **Denial of Petitioner's Right to Recovery for Failure to Appear Before the Board of Equalization Determines a Federal Question Contrary to Decisions of This Court.**

In this case the court below denied petitioner any recovery solely because it had failed preliminarily to appear before the county board of equalization. In applying this procedural bar, the court recognized that there was an exception "when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction" [R. 124]. It recognized that petitioner contended that national bank fixtures were "exempt" under the statutory mandate of R. S. 5219 and the Federal Constitutional guaranty of equal protection [R. 125]. The court, however, refused to sustain petitioner, saying that national bank fixtures were "property of a nature taxable by defendant" and "admittedly were located within the County, City and District in which they were assessed" [R. 125]. The gist of the judgment below, although procedural in nature, thus involved a determination under the circumstances of this case as to whether petitioner's fixtures were in truth "exempt" or "outside the jurisdiction" of the State of California to tax. If so, on the face of the opinion below, the procedural bar was erroneously applied.

Such determination involved construction by the State Court of the equal treatment requirements of R. S. 5219 and the Equal Protection clause. The decision of the State Court below is not binding on such matters upon this Court. The basic Federal question upon which the application of the procedural bar confessedly rested is one ultimately for determination by this Court. *Standard Oil Company of California v. Johnson,* 316 U. S. 481, 483; *Fisher v. Whiton,* 317 U. S. 217, 220; *Rawlings v. Ray,* 312 U. S. 96, 98.

Such determination by the State Court herein was contrary to decisions of this Court in reference to both R. S. 5219 and the Equal Protection clause. The authorities which sustain petitioner's contentions are briefly stated in Reasons for Allowing the Writ, Nos. 5-9 (App. B pp. 10-21). Under these authorities and the facts of this case, it is clear that petitioner's national bank fixtures were not only "exempt" from taxation in Los Angeles County but its building was beyond the "jurisdiction" of respondents to tax, until by appropriate reassessment proceedings petitioner's building had been assessed in the same manner as other buildings had been assessed in Los Angeles County.

2. Decisions of This Court Hold That a State Which Has Denied a Taxpayer Equal Treatment Cannot Impose Upon Him the Burden of Removing the Inequality by Seeking Upward Revision of Taxes of Others.

Appearance before the board of equalization in 1941, for want of which the California Supreme Court barred petitioner's recovery, was not the usual taxpayer's application to secure reduction of or to cure a defect in *his own* assessment. Relief which the State Supreme Court said petitioner should have sought was for the board to direct the assessor "to enter the *misclassified* fixtures owned by *others* as real property upon the assessment roll" [R. 126] and thereby remove the "discrimination."

This Court has long held that a State cannot deny a taxpayer equal treatment in violation of either R. S. 5219 or the Equal Protection clause and excuse the resultant injury by placing upon him the burden of securing an upward revision in the taxes of other members of the same class. *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447. Moreover, there is no statutory procedure in California by which a taxpayer can initiate such proceeding or compel action if the board fails to act (R. & T. C. 1611, App. A p. 3).

3. Decisions of This Court Hold That a Taxpayer Will Not Be Barred From Tax Recovery Because of Failure to Apply to a Board of Equalization When Such Would Have Been a Futile Act.

The State Supreme Court in the *Simms Case* found that "the facts" as to the assessor's general practice of classifying trade fixtures as personalty and his intentional, deliberate and unjustified deviation therefrom as to national bank fixtures "had been presented to the county board of equalization which, with full knowledge thereof, denied applications for relief" in each of the years in controversy [R. 132]. In 1941 relief was specifically asked under Revenue and Taxation Code Section 1611 by landlords of petitioner bank [R. 109]. At such time, petitioner national bank joined in their application although it was primarily directed at fixtures located in landlord-owned buildings [R. 109, 121]. For petitioner bank to have made an additional formal appearance as to its own building would have been to do an idle and useless act.

When a state court finds a tax to have been levied in violation of R. S. 5219 or contrary to requirements of the Equal Protection clause, this Court will not permit it to refuse to return the invalid taxes because the taxpayer

failed to apply to a board of equalization if it appears that to have done so would have been futile or useless. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 505; *Hills v. Exchange Bank,* 105 U. S. 319, 321; *Whitbeck v. Mercantile Bank,* 127 U. S. 193, 199.

4. For the California Supreme Court to Require, for the First Time in 39 Years, a Taxpayer to Appear Before a County Board of Equalization Under the Circumstances of This Case and to Apply Such Rule Retroactively When Petitioner Could Not Comply, Constituted a Denial of Due Process of Law.

Prior to 1911 the California rule was that application to a county board of equalization was a required preliminary step before attacking in court the validity of an assessment even though it were claimed to be void because of inclusion of exempt property. *Henne v. County of Los Angeles,* 129 Cal. 297, 61 Pac. 1081. In 1911 the State Supreme Court in *Brenner v. City of Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397, 399, repudiated the *Henne Case* saying:

> "But we are of the opinion that, insofar as *Henne v. County of Los Angeles* places in the same category the mere over-valuation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all, that case should be overruled."

When these proceedings took place (1941) and substantially at all times up to decision herein, the *Brenner Case* stood unquestioned.[4] Throughout the controversy in this

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[4] *Kern River Co. v. County of Los Angeles,* 164 Cal. 751, 756, 130 Pac. 714, 715 (1913); *Luce v. City of San Diego,* 198 Cal. 405, 406, 245 Pac. 196 (1926); *Associated Oil Co. v. County of Orange,* 4 C. A. 2d 5, 9, 40 Pac. 2d 887, 889 (1935); *Los Angeles etc. Corp. v. Los Angeles,* 22 C. A. 2d 418, 422, 71 Pac. 2d 282, 284 (1937); *City and County of San Francisco v. County of San Mateo,* 95 A. C. A. 699, 703, 213 Pac. 2d 505, 508 (1950).

It was not until hearing was granted by the State Supreme Court in the last cited decision on March 16, 1950, that there was any indication in California that an application before a board of equalization was required in any but an overvaluation case.

and in the *Simms Case,* counsel for respondents and the county board of equalization itself took the position that questions involved were matters which could *not* be presented to or considered by a county board of equalization [R. 90-91; 152-155].

Contrary to its established rule of 39 years duration, the State Supreme Court has thus held herein that a taxpayer is barred from recovery of a tax known to be invalid under Federal Statute and Constitution because of a heretofore undiscovered administrative requirement. It has applied such new rule retroactively to a proceeding instituted nine years earlier. By summarily directing the trial court to enter judgment for the defendant, it has held that, because of passage of time, petitioner cannot now make the newly required administrative application.

On identical facts this Court by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-80, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Cases cited by the State Supreme Court in support of its holding that application to a board of equalization is required when discrimination has occurred in "classification of property," have no bearing upon the denial of due process herein. *California etc. Co. v. Los Angeles,* 10 Cal. App. 185, 101 Pac. 547 (1909), was an inferior court decision. If it was opposed to the *Brenner Case,* it was over-

ruled by it in 1911. *Kaiser Co. v. Reed,* 30 Cal. 2d 610, 630, 184 P. 2d 879, 891, was decided in 1947. Petitioner could not be required in 1941 to anticipate reversal in 1947 of such long established rule. Nor was the *Kaiser Case* in fact concerned with necessity for appearance before a board of equalization.

Petitioner specifically raised its additional injury under the Due Process clause on petition for rehearing [R. 160-166]. The California Supreme Court denied such petition [R. 177] without opinion or modification of its former judgment. Petitioner's additional Federal question was timely since raised at its first opportunity. *Missouri ex rel. Missouri v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.

CONCLUSION.

Wherefore, it is submitted that the Writ of Certiorari prayed for in the petition herein should be granted, and the judgment and order of the California Supreme Court should be reversed.

Respectfully submitted,

W. Sumner Holbrook, Jr.,
Edmund Nelson,
Counsel for Petitioner.

APPENDIX A.

1. Pertinent Provisions of the California Constitution and Statutes Relating to the Assessment of Local Ad Valorem Taxes.

ARTICLE XIII, SECTION 2, CALIFORNIA CONSTITUTION.

2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.

ARTICLE XIII, SECTION 10, CALIFORNIA CONSTITUTION.

10. All property, except as otherwise in this Constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law.

DIV. 1, PART 2, CHAP. 3, ART. 6 OF THE CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ASSESSMENT ROLL."

Section 601. The assessor shall prepare an assessment roll, as directed by the board, in which shall be listed all property within the county which it is the assessor's duty to assess.

Section 602. This local roll shall show:

(a) The name and address, if known, of the assessee.

(b) Land by legal description.

(c) A description of possessory interests sufficient to identify them.

(d) Personal property. A failure to enumerate personal property in detail does not invalidate the assessment.

(e) The cash value of real estate, except improvements.

(f) The cash value of improvements on the real estate.

(g) The cash value of improvements assessed to any person other than the owner of the land.

(h) The cash value of possessory interests.

(i) The cash value of personal property, other than intangibles.

(j) The revenue district in which each piece of property assessed is situated.

(k) The total taxable value of all property assessed, exclusive of intangibles.

(l) The actual value of solvent credits, after legal deductions for debts.

(m) Any other things required by the board.

Section 607. Land and improvements thereon shall be separately assessed.

2. Pertinent Provisions of the California Constitution and Statutes Relating to Powers and Duties of a County Board of Equalization.

ARTICLE XIII, SECTION 9, CALIFORNIA CONSTITUTION.

. . . The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; . . .

DIV. 1, PART 3, CHAP. 1 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "EQUALIZATION BY COUNTY BOARD OF EQUALIZATION."

Section 1611. After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

3. Pertinent Provisions of California Statutes Relating to Payment of Local Taxes Under Protest and Terms of Judgment in Tax Recovery Actions.

DIV. 1, PART 9, CHAP. 5, ART. 2 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "PAYMENT UNDER PROTEST AND SUIT TO RECOVER."

Section 5136. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5137. The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

(b) The grounds on which the claim is founded.

Section 5137.5. The written protest shall be numbered by the tax collector and filed in his office and the fact of

such protest and the number thereof shall be marked on the roll or delinquent roll, opposite the tax to which the payment relates.

Section 5138. Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 5139. The action may be brought only:

(a) As to portion of the assessment claimed to be void.

(b) On the grounds specified in the protest.

(c) By the owner, his guardian, executor, or administrator.

Section 5140. On payment of a judgment against the county in an action under this article, any part of the tax recovered which was paid by the county treasurer to the State Treasurer is an amount due the county from the State and shall be deducted in the next settlement had by the county with the Controller.

Section 5141. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs.

Section 5142. Where the taxes sought to be recovered have been paid after delinquency, the amount of penalties, interest or costs recoverable in actions brought under this article shall be computed only on the taxes recovered.

Section 5143. As used in this article, "tax" or "taxes" includes penalties, interests and costs.

4. Pertinent Provisions of California Statutes Relating to Reassessment Proceedings.

DIV. 1, PART 9, ART. 3 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ENFORCEMENT OF TAXATION AFTER ERRONEOUS PROCEEDINGS."

Section 4946. All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may on satisfactory proof submitted by the tax collector be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney upon a showing that the collection of the delinquent tax cannot be enforced because of any errors in description, assess-

ment, equalization, levy, or any other proceeding. If all or any portion of the property was taxable for the year or years for which the cancellation is made, the clerk shall send a notice to the last assessee of the property respecting the cancellation. A similar notice shall be sent to the last assessee, except that the grounds of cancellation need not be stated, in the event that any tax, penalty or costs, or any portion thereof, is ordered canceled or held void or ordered refunded by a final judgment of a court of competent jurisdiction.

Section 4947. The notice shall state:

(a) The grounds of cancellation;

(b) That collection of the tax for the year for which cancellation was made will be enforced unless cause is shown why such action should not be taken;

(c) That the assessee may demand a hearing by the board of supervisors within ten days after the notice is sent. If demanded, the board of supervisors shall set a time for the hearing and its decision is final as to whether or not collection of the tax should be enforced. If any portion of the property was taxable for the year for which cancellation is made, the board of supervisors shall order collection of the corrected tax for the year for which cancellation was made.

Section 4948. If the board of supervisors orders that collection of the tax should be enforced, the assessor shall assess the property at its value on the lien date of the year for which cancellation was made.

The property shall be entered on the roll prepared or being prepared in the assessment year when the cancellation is made. The entry shall be followed with "Taxes

canceled for year 19.... and collection ordered enforced by Board of Supervisors ..... 19....."

The amount charged against the property on the roll on which it is entered shall be the corrected tax for the year for which the cancellation was made. No penalties or other charges shall be charged on this assessment except those which may attach to other property assessed for the year in which this property is placed on the roll. If the tax rate for the year for which the cancellation is made has not been held invalid by a court, the tax rate to be applied shall be the rate fixed for such year. If the tax rate or any portion of it has been held invalid by a final judgment of the court, the corrected tax shall be determined by the auditor by applying all such judgments in the manner prescribed by the Controller.

Any revenue received on this assessment for the year for which cancellation is made shall be treated like revenue received from delinquent taxes for such year.

The collection of the tax shall be enforced in the same manner as the tax on other property on the roll on which it is entered.

5. Pertinent Provisions of the California Constitution and Statutes Relating to Exemption From Local Taxation of Personal Property of Banks and Taxation of Bank Income at a Higher Rate Because of Such Exemption.

ARTICLE XIII, SECTION 16, CALIFORNIA CONSTITUTION.

1. (a) Banks, including national banking associations, located within the limits of this State, shall annually pay to the State a tax according to or measured by their net income, which shall be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property, at the rate to be provided by law.

(b) The Legislature may provide by law for any other form of taxation now or hereafter permitted by the Congress of the United States respecting national banking associations; provided, that such form of taxation shall apply to all banks located within the limits of this State.

SECTON 4a, CALIFORNIA BANK AND CORPORATION FRANCHISE TAX ACT (California Statutes 1933, page 871, as amended).

Section 4a. Rate of tax on national banking associations and other banks and financial corporations. The rate of tax on National banking associations and other banks and financial corporations mentioned in Sections 1, 2, and 4 of this act, shall be a percentage equal to the percentage of the total amount of net income, allocable to this State, of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilities Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this State as franchise taxes according to or measured by such net income, and required to be paid to this State or its political subdivisions by such corporations as personal property taxes during the preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 8 percentum. The percentage of the net income of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilties as defined in the Public Utilities Act, required to be paid to this State or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 4 percentum thereof, bears to the total amount of net income of such

corporation, allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to California the personal property taxes required to be paid by such corporation to this State or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.

The commissioner, after public hearing and opportunity given to examine the data on which his determination is based, shall determine not later than the thirty-first day of December of each year the average percentage of net income above specified, and, within thirty days after his determination, shall mail notice of his determination and the amount of tax payable on the basis of such determination to all banks and financial corporations affected thereby, which are then classified on his records as banks or financial corporations, but such determination shall not be considered a deficiency assessment within the meaning of Section 25 hereof. The data gathered by the commissioner in determining the rate, referred to herein, shall be made available to the taxpayers affected by such determination at the time and in the manner prescribed by regulations adopted by the commissioner.

If it be judicially determined that the rate of tax on any bank or corporation is higher than is authorized by law such bank or corporation shall be relieved of liability for any tax imposed by this act only to the extent of the excess beyond that legally authorized.

APPENDIX B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AS TO GROUNDS 3-6, INCLUSIVE.

5. So Long as a State Generally Classifies and Taxes Fixtures as Personal Property, It Has No Power to Classify and Tax National Bank Fixtures as "Real Property"; Taxes so Levied in Order to Evade Restrictions of R. S. 5219 Constitute "Discrimination."

National banks are agencies of the United States, created under its laws to promote its fiscal policies. They may be taxed by states only in strict conformity with the consent of Congress. *Des Moines National Bank v. Fairweather,* 263 U. S. 103, 106; *First National Bank v. Anderson,* 269 U. S. 341, 347; *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 667-669. As to tangible property, this congressional consent is found only in paragraph 3 of R. S. 5219. No consent is given thereby for states to tax *personal* property. *Owensboro National Bank v. Owensboro, supra; Rosenblatt v. Johnston,* 104 U. S. 462, 463.

Congressional consent, thereunder, to taxation of national bank-owned "real property" is limited to taxes thereon "to the same extent, according to its value, as other real property is taxed." This phase, or slight variant thereof, has been incorporated by Congress in substantially all provisions permitting limited state taxation of property of various federal agencies.[5] Its importance is not restricted to petitioners or to national banks generally.

A state, for tax purposes, may define for itself what constitutes "real property" and such definition will apply

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[5]Reconstruction Finance Corporation, 15 U. S. C. 607 (c. 334, §5, 62 Stat. 265);
Commodity Credit Corporation, 15 U. S. C. 713a—5 (c. 44, §5, 52 Stat. 108);
Federal Credit Union, 12 U. S. 1768 (c. 3, §4, 51 Stat. 4);
Federal Farm Mortgage Corporation 12 U. S. C. 1020-f (c. 33, 48 Stat. 360);
Federal Home Loan Bank, 12 U. S. C. 1433 (c. 150, §8, 49 Stat. 295);
Federal Reserve Bank, 12 U. S. C. 531 (c. 101, §1, 40 Stat. 1314);

to and authorize state taxation under the federal statute as "real property." *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204, 210. Such state definition must, however, "not effect a discrimination against the Government or patently run counter to the terms of the Act." (*Ibid.*)

But "discrimination" may also result from the manner in which a statute is applied. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504. Elimination by *administrative* definition of all other fixtures from the terms of the uniform California statute, with consequent classification and taxation, if at all, as personal property, is as inharmonious with the Congressional consent as would be a statute to the same effect. Compare *Hamilton National Bank v. District of Columbia,* 156 F. (2d) 843, 846. (C. A. D. C.); *Ibid.* (Second Appeal) 176 F. (2d) 624, 630, certiorari denied 338 U. S. 891.

The trial court held that, if national bank fixtures had received the *general* classification, they would have been exempt from taxation under Section 5219 [R. 57]. Factually such was conceded by the State Supreme Court [R. 128]. This finding should have determined the controversy in favor of petitioners. The State Supreme Court, however, held that this would give national bank fixtures an "unwarranted exemption" [R. 133]. But power of Cali-

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Home Owners Loan Corporation, 12 U. S. C. 1463-c (c. 621, 56 Stat. 986),

Federal Deposit Insurance Corporation, 12 U. S. C. 264-p (c. 62, §1, 57 Stat. 65);

Federal Savings and Loan Insurance Corporation, 12 U. S. C. 1725-e (c. 150, §22, 49 Stat. 298);

Production Credit Association, 12 U. S. C. 1138-c (c. 98, §63, 48 Stat. 267).

Additionally by 1947 enactment Congress has employed the phrase "to the same extent" as limiting the authority to levy on governmental transactions many forms of state taxation of an excise character. 4 U. S. C. 104-106.

fornia to tax national bank fixtures does not exist because, under statute law or otherwise, they are "real property." If a State fails to tax land and buildings owned by state-chartered banks, it cannot under R. S. 5219 tax land and buildings of a national bank. *Covington City National Bank v. City of Covington,* 21 Fed. 484, 487. (Cir. Ct. D. Ky.) The power flows only from compliance with conditions expressed in the phrase "to the same extent, according to its value, as other real property is taxed."

These words in tax statutes have long been construed to mean "in the same manner." *People v. Feitner,* 167 N. Y. 1, 8; 60 N. E. 265, 268. On analogous situation the Court of Appeals for the District of Columbia in the second appeal in *Hamilton National Bank v. District of Columbia, supra,* p. 630, said:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in §1703, the national banks in the District which have interest-bearing savings deposits must be classified and taxed in the same manner." (Cert. denied, 338 U. S. 891.)

Likewise on identical facts with this proceeding, was the decision of the Oregon Supreme Court in *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613-616; 130 P. (2d) 9, 16-17. It held taxes levied upon national bank fixtures assessed as real property to be "void" when all similar fixtures had been assessed as personal property.[6]

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[6]The conclusion of the Oregon Court was stated as follows (p. 16):

> "If trade fixtures are classified as personal property for the purpose of taxation, they must be taxed, if at all, as personal property, and not as realty."

Respondents' only power to tax national bank "real property" was thus *on condition* that real property of others be taxed "in the same manner" including classification thereof as real property. Congressional permission to tax the national bank fixtures involved herein was transgressed when the Congressional condition was not fulfilled. The "discrimination" in classification was nonetheless action by the state although the county assessor in failing to give the required "real property" classification to all other fixtures acted contrary to the law of the state. *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County*, 276 U. S. 504, 505. The assessor's failure to comply with the terms of the Congressional consent under R. S. 5219 rendered the national bank fixtures and the buildings with which they had been indivisibly assessed during the period "exempt" from state taxation, until by proper reassessment proceedings, uniform in character with assessments made of similar property owned by others, petitioner's buildings were brought within the terms of the Congressional authority.

6. So Long as a State Classifies and Taxes Fixtures, if at All, as Personal Property, the Equal Protection Clause and R. S. 5219 Require Like Treatment of National Bank Fixtures.

The Equal Protection clause protects the taxpayer from State action which selects him out for discriminatory treatment. It guarantees him "the right to equal treatment." *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 245-246.

The right to equal treatment includes the right to similar "classification." Compare *Hamilton National Bank v. District of Columbia*, 176 F. (2d) 624, 630; *ibid.* (first appeal) 156 F. (2d) 843, 846. Conclusion by the State Supreme Court that had national bank fixtures been given

the same classification applied to other fixtures, they would have been "exempt" [R. 128] required further declaration that petitioners' taxes were prohibited by the Equal Protection clause and that national bank fixtures were "exempt" from local taxation.

In reversing the trial court which so held [R. 57] the California Supreme Court concluded that arbitrary withholding of a benefit granted others (*i. e.*, classification as personal property) is not within the purview of the Equal Protection clause [R. 135]. Decisions of this Court have long held that its prohibition is aimed at "undue favor and individual or class privilege" as well as "oppression." *Truax v. Corrigan,* 257 U. S. 312, 332-333.

While recognizing that equal treatment of national bank fixtures would have required them to be treated as "exempt personal property," the State Supreme Court negatived such result upon the ground that the California statute as construed by it in *Trabue-Pittman Corp. v. County of Los Angeles,* 29 C. (2d) 385, 393; 175 P. (2d) 512, 518, declared them to be "real property" [R. 130]. Under the Equal Protection clause the right to equal treatment is paramount over requirement of statute, even though such results in exemption from state taxation. *Hillsborough Township v. Cromwell, supra; Montana National Bank v. Yellowstone County,* 276 U. S. 499, 503-504.

7. "Discrimination" in Violation of R. S. 5219 and the Equal Protection Clause Is Not Excused by Levy of Personal Property Taxes on Other Misclassified Fixtures.

This Court has long held in cases involving power of a State to tax property of a federal agency that mere "equivalency" in amount between an unauthorized tax and a valid tax or that the unlawful tax represented, no more than "what might have been done," will not bring

taxes, in fact levied beyond the bounds of Congressional consent, within the authority of R. S. 5219. *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 683; *First National Bank of Gulfport v. Adams,* 258 U. S. ~~326~~ 362 365. The question is one of power, not of amount. Lack of power cannot be justified by claimed fairness in imposing a similar tax on other property admittedly subject to state taxation. Compare *Freeman v. Hewit,* 329 U. S. 249, 254; *Fairbank v. United States,* 181 U. S. 283, 291.

To the contrary, the State Supreme Court concluded that discriminatory tax classification was not prohibited under R. S. 5219 so far as general county and city taxes were concerned, because "misclassified" fixtures of others were subjected to similar taxes. For such holding it erroneously relied upon decisions of this Court in *Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, and *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373. These decisions were not concerned with power of a State to tax national bank real property nor with the provisions of paragraph 3. They considered state taxes levied on national bank shares and on national bank income authorized, if at all, by paragraph 1(b) or 1(c). Conditions placed upon Congressional consent under these paragraphs are far different from that of paragraph 3, depending not upon similarity of treatment, but upon the "rate" of tax levied on other competing "moneyed capital" or other types of corporate income. In the cited decisions this Court has held that the word "rate" so used refers to *all* taxes levied on competing "moneyed capital" or other corporate income irrespective of the number of other taxes involved or the manner in which the other taxes were levied. Such construction of a different form of Congressional consent is neither applicable nor persuasive here.

Also "discrimination" prohibited by the Equal Protection clause applies to withholding an "undue favor and individual or class privilege" granted others, as well as to direct unequal "oppression." *Truax v. Corrigan,* 257 U. S. 312, 323-333.

9. In Withholding From Petitioners Full Recovery of Their Invalid Taxes Contrary to Decisions of This Court and as Required by Valid State Statute, the Judgment of the California Supreme Court Was a Denial of Due Process of Law.

A declaration by a court of last resort, as in this case, that a taxpayer has been wronged in violation of Federal Statute or Constitution requires more than such admission of wrongdoing. A taxpayer's constitutional right includes the right to judgment by the state court refunding *in full* the invalidly exacted taxes. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247.

By statute, California recognizes this duty [R. & T. C. 5136-5143, App. A pp. 3-5]. Thereunder, a wronged taxpayer is entitled to pay a tax, invalid because of "void assessment," under protest and to sue and recover judgment refunding him *all* taxes based on such void assessment. In compliance with this statute the trial court entered judgments refunding petitioners *all* taxes paid on their invalid building assessments [R. 64-68] subject to respondents' later right to reassess the buildings constitutionally in accordance with the method applied uniformly to other buildings. [R. & T. C. 4946-4948, App. A, pp. 5-7.]

The California Supreme Court, in reversing the trial court and refunding to petitioners only special assessment taxes, intentionally and deliberately denied to them the relief expressly provided by state statute in such cases and thereby left in the public treasury the major portion of the invalid taxes previously exacted. Moreover, it never questioned the validity of the state statute it ignored nor its clear and unambiguous meaning.

These suits were conducted pursuant to specific statutory procedure [R. & T. C. 5136-5143, App. A pp. 3-5]. For a taxpayer to prevail thereunder the trial court *must*

find "that the *assessment* complained of is *void* in whole or in part" [R. & T. C. 5141, App. A p. 5]. The statute prescribes that the resulting judgment shall be for "the amount of taxes paid on *so much* of the *assessment* as is found to be *void*" [R. & T. C. 5141, App. A p. 5].

The trial court found that, under the circumstances of this case, assessment of national bank fixtures as "real property" was prohibited by both R. S. 5219 [R. 60] and the Equal Protection clause [R. 60]. Because the fixture portions of the assessments were judicially indivisible from assessments on the remainder of petitioners' buildings, it held them *entirely* "void" [R. 60-61]. Such latter determination, upon the facts of this proceeding, was required by decisions of this Court. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 416; *California v. Central R. R. Co.*, 127 U. S. 1, 45. The judgment of the trial court [R. 64-68] for recovery of all taxes "paid" on their building assessments was the *only* judgment authorized [R. & T. C. 5141, App. A p. 5].

The State Supreme Court approved all factual findings made by the trial court [R. 128]; it recognized that equal treatment required classification of bank fixtures as personal property with consequent exemption from local taxation [R. 129]; and it found under California law that "if the taxing authorities 'resort to arbitrary methods varying from those employed in assessing other property of like character and situation and resulting in the imposition designedly of an illegal burden on the part of the complainant'" the resulting assessments would be "invalidated by the courts" [R. 131].

Without consideration of facts so found or its own declaration as to applicable law, the State Supreme Court ignored the invalidity of the *assessments* and regarded the case as one involving only invalidity of subsequently imposed *taxes*. It referred to taxes on each building as

being in part "valid" and in part "invalid" [R. 137]. But there was only *one* assessment of petitioner's building regardless of the number or kinds of taxes extended against it [R. 19]. In California there cannot be a valid tax for any purpose levied on a *void* assessment. Cal. Const. Art. XIII, Sec. 10 (App. A p. 1); *People v. Hastings*, 29 Cal. 449, 451; *Universal Consolidated Oil Co. v. Byram*, 25 Cal. 2d 353, 361. In ordering the trial court to refund only special assessment taxes the State Supreme Court ordered a judgment in defiance of statute.

The statute places the duty upon the court to determine the extent of the "void" assessment [R. & T. C. 5141, App. A p. 5]. The trial court held it could not divide building assessments between fixtures and the remainder of the buildings [R. 49, 59]. The California Supreme Court approved this conclusion [R. 137]. Accordingly, in this case, the trial court held the assessment to be wholly void [R. 59-60]. But, in the *Simms Case*, the State Supreme Court ordered the trial court, in disregard of statute, to refer such assessments for division to the county board of equalization, a body entirely unauthorized by state statute or Constitution to make such separation. Cal. Const. Art. XIII, Sec. 9 (App. A p. 1); R. & T. C. 1611 (App. A p. 3).

The State Supreme Court excused this disregard of the statute-required judgment and the consequent denial to petitioners of their vested rights thereto upon the ground, for the first time so declared, of a *court* "policy" that to "require defendants to refund the valid portion of the special district taxes attributable to the value of plaintiff's buildings and to pay interest thereon" "would be contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions" [R. 137]. The California Supreme Court thus deliberately arrogated to itself, in violation of petitioners' vested Federal rights thereunder,

authority to override a valid statute an act which this Court has uniformly held not to be within the permissible limits of the judicial function. *Osborn v. Ozlin,* 310 U. S. 53, 66.

This Court, by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-680, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Petitioners specifically raised their additional injury under the Due Process clause on petition for rehearing [R. 150, 156, 234-242]. The California Supreme Court denied such petition [R. 177] without opinion or modification of its former judgment. Petitioner's additional Federal question was timely since raised at its first opportunity. *Missouri ex rel Missouri Co. v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.

No. 361

NOV 13 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

United States

October Term, 1950

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. McCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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In the
Supreme Court of the United States
October Term, 1950

W. J. SIMMS, WILLIAM S. ROSECRANS, Edward W. COST, CARRIE D. GRIBBLE, ZELLA Z. McCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

OPINION BELOW

The opinion of the Supreme Court of California herein (R. 317) is reported in 35 Advance California Reports 332, 217 Pac. 2d 936. No opinion was rendered on denial of rehearing. (R. 439).

JURISDICTION

The petition herein seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1257 (3) and 2101 (c). Those provisions do not afford jurisdiction however, since there is not raised herein any substantial or important Federal question. In addition, with respect to the fifth question asserted (Pet., p. 4, claimed denial of Due Process of Law), jurisdiction is also wanting for failure of petitioners to seasonably raise the ques-